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IN THE

Supreme Court of The United States

OCTOBER TERM, 1958

No. 88

EDGAR B. SIMS,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (R. 28-37) is reported at 252 F. 2d 434.

JURISDICTION

The judgment of the Court of Appeals was entered February 7, 1958 (R. 37-38). On March 7, 1958, petitioner filed a petition for rehearing (R. 38-40), which

was denied by order dated March 13, 1958 (R. 40). Petition for a writ of certiorari was filed on June 7, 1958, and was granted on October 13, 1958 (R. 41). The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See also Rule 19.1(b) of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether the provisions of Sections 6331 and 6332 of the Internal Revenue Code of 1954 apply to states and state officers, and, in particular, to this petitioner, the Auditor of the State of West Virginia.

2. Whether a state auditor who, in the performance of his official duties and upon the advice of the attorney general, declines to honor a levy served upon him in his official capacity, under the provisions of Section 6331 of the Internal Revenue Code of 1954, is individually and personally liable under the penal provisions set out in Section 6332(b) of said Code.

STATUTES INVOLVED

The following statutes are involved in this case and are set out in full in the Appendix of this brief:

> 26 U.S.C. 6321, 26 U.S.C. 6331, 26 U.S.C. 6332, 26 U.S.C. 7403, Chapter 12, Article 3, Section 13a, of the West Virginia Code.

26 U.S.C. 7701 is quoted, in part, in the body of this brief.

STATEMENT

The United States has obtained a judgment against this petitioner, in his individual capacity, under the penal provisions of Section 6332(b) of the Internal Revenue Code of 1954 (R. 18). As stated in the complaint filed in the United States District Court for the Southern District of West Virginia (R. 1-9), certain employees of said State failed to pay taxes to the federal government on incomes earned by them in employment separate and apart from, and entirely unrelated to, their state employment. Taxes on wages earned by them as state employees were withheld in accordance with law and were remitted to the Director of Internal Revenue. Consequently, no taxes are owed by such employees to the federal government for any income earned pursuant to their state employment.

The district director, having made demands for payment upon such taxpayers, and having failed to receive payment, served, in each instance, a Notice of Levy on the State of West Virginia (R. 5, 19) by serving a copy thereof on Edgar B. Sims, Auditor, State of West Virginia. Four of such notices were addressed to the State of West Virginia, as the person holding property, moneys, etc., belonging to the taxpayer. One was addressed to "Edgar B. Sims, State Auditor of the State of West Virginia." All of such notices were served on Edgar B. Sims, Auditor, State of West Virginia (R. 20). The government claimed as authority for the service of such notices Section 6331(a) of the Internal Revenue Code of 1954 (R. 5).

On the advice of the State Attorney General, this petitioner, acting in his official capacity as auditor and

exercising the discretion he believed required of him, refused to honor said Notices of Levy. The United States subsequently instituted an action against this petitioner as auditor of the state and as an individual. As a result of his motion to dismiss (R. 10), the defendant as auditor was dismissed, but the suit was maintained against him in his individual capacity (R. 11-12). On May 23, 1957, this case was heard by the Judge of the aforesaid District Court. After argument of counsel, the court rendered its decision in favor of the United States. Although no written opinion was rendered, a memorandum of the court's oral opinion was forwarded to counsel (R. 25). Pursuant thereto, the court, on July 24, 1957, entered its judgment order (R. 18).

Upon appeal from this judgment, the United States Court of Appeals for the Fourth Circuit, on February 7, 1958, entered its order affirming the holding of the District Court (R. 37-38). A petition for a rehearing was filed on March 7, 1958 (R. 38-40), and was denied on March 13, 1958 (R. 40). This Court's order granting a petition for a writ of certiorari was entered on October 13, 1958 (R. 41).

ARGUMENT

I

The Term "Person," as Used in Section 6332 of the Internal Revenue Code of 1954, Does Not Include a State or an Officer or Employee Thereof. The Statute, Being Penal in Nature, Should be Strictly Construed.

It is most pertinent to the consideration of this matter that the language of Section 6332 of the Internal Revenue Code of 1954 fails to include the state or an officer or employee thereof. Such section, in providing for the surrender of property subject to levy, relates, not to taxpayers, but to those in possession of or owing property to the taxpayer. A duty is thereby imposed upon any person in possession of property or rights of a taxpayer to surrender such property or rights to the Secretary or his delegate. Subsection (b) thereof provides a penalty for the violation of such duty. This is the penalty to which the petitioner, Edgar B. Sims, has been subjected by the court below.

The question now necessarily arises as to what the term "person" means and includes, as used in said Section 6332. In setting out the requirement and penalty for the violation thereof the word "person" is used. Subsection (c) defines person in the following manner:

> "(c) Person defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or em-

ployee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation."

A further definition of "person" is set out as follows, in 26 U.S.C. 7701. Definitions:

> "(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—
>
> "(1) Person.—The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation."

An examination of the foregoing definitions readily reveals that neither a state nor an officer or employee thereof is included in the term "person," as used in Section 6332. Such definitions list what "person" intends to mean and include. It includes an individual, a trust, estate, partnership, association, company or corporation. It further includes an officer or employee of a corporation or a member or employee of a partnership. Nowhere does the definition of "person" include a state or an officer or employee thereof. The language is thus clear and unambiguous, and, in such instances it is the duty of the courts to enforce it according to its obvious terms. In such case there is no necessity for construction. In support thereof, this court said, in *Yates* v. *United States*, 354 U.S. 298, 1 L. ed. 2d 1356 (1957):

> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction."

This is such a well established principle of law that we believe it unnecessary to cite further cases in support thereof.

Applying this general rule of law to the case at bar, it is submitted that Congress, in enacting Section 6332, did not include a state within the meaning of the term "person." The language, being clear and unambiguous, the courts below should not have construed such statute to mean what they believed Congress intended.

It is particularly pertinent that, in deciding the instant case, both the District Court and the Court of Appeals readily acknowledged that neither officers nor employees of a state were mentioned in Section 6332 (c). However, each court held that to exclude states from the operation of the statute would lead to an illogical, absurd and unreasonable result. In relation thereto, this Court has forcefully stated that great caution must be exercised in rejecting the literal meaning of a statute in favor of a construction in harmony with the *supposed* spirit and purpose thereof. This was cogently stated in *Crooks* v. *Harrelson*, 282 U.S. 55, 75 L.ed. 156 (1930), wherein the Court said:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. Monson v. Chester, 22 Pick. 385, 387. It is not

> enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts."

In view of this pertinent language, should the courts below have read words into the statute merely because of a supposed absurdity? If the language of a statute reaches an absurd result, is it not up to Congress to correct such statute? The petitioner respectfully urges that it is.

The legislative history of Section 6332 fails to reveal that Congress intended for its provisions to relate to states. Section 6332 is similar to Section 3710 of the Internal Revenue Code of 1939, which was derived from the Act of February 26, 1926, C. 27, Sec. 1114(e) and (f), 44 Stat. 117. An examination of said Sec. 1114(e) and (f) in the United States Statutes at Large reveals basically the same language as that contained in Section 3710, I.R.C., 1939. To show the similarity between the existing statute (Sec. 6332) and Sec. 1114(e) and (f), 1926 Acts, the latter is quoted as follows:

> "'(e) Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right

is, at the time of such demand, subject to an attachment or execution under any judicial process. Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

"'(f) The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.'"

It is significant that Congress, upon revising the internal revenue laws in 1926, in 1939 and in 1954, retained basically the same language insofar as penalties are concerned and did not, in any instance, include the state, or an officer or employee thereof. Also, the definitions of "person" remained the same.

In the Senate Report, during the consideration of H. R. 8300 (IRC, 1954), it was stated that Section 6331 continued in effect 3690 and 3692 of the 1939 Internal Revenue Code. The Senate Committee clarified the provisions of the House bill by expressly providing that accrued salary or wages of any officer, employee, or elected official of the United States or the District of Columbia, or any agency or instrumentality thereof, may be levied upon by serving a notice of levy on the employer (as defined in Section 3401(d)) of such officer, employee, or elected official. The report

said that the change in this section makes unnecessary any change from existing law in the definition of person in Section 6332(c) of the House bill. See U.S. Code Cong. & Adm. News, 1954, Vol. 3, p. 5225. The bill was adopted by Congress as changed by the Senate.

It is apparent that the Senate so amended the House bill in order to make clear its intent to subject the salary or wages of officers and employees of the United States to the levy provided in the Act. Further language of the Senate Report shows that if the provision relating to such salary or wages were not included, the definition of "person" in Section 6332(c) would have to be changed to include officers and employees of the United States. It is submitted that the definition of person is not sufficiently broad to include such officers and employees, and that they are now included only because of the express language pertaining thereto in Section 6331. It is further submitted that such definition of "person" also fails to include officers and employees of a state. There being no express provision in Section 6331 to bring accrued salaries of officers and employees of a state within the act, it is asserted that such accrued salaries are not subject to the levy so provided. If Congress had desired to include states, it could easily have done so in the same manner in which it provided for salaries of officers and employees of the United States. It did not so provide, there being nothing in the legislative history which tends to show otherwise. Consideration must be given to what Congress actually did, not to what an administrator thinks it intended to do.

The comments of the court below (R. 34), relative to *Smith* v. *Jackson*, 246 U.S. 388, tend to support the

position of this petitioner. It was therein noted that a federal disbursing officer has no right to set-off, against a federal employee's salary, for debts owing to the United States. The court then said: "Undoubtedly, Section 6331 was designed to alleviate this difficulty and to subject federal employees to the same collection procedures as are available against all other taxpayers, *including employees of the state.*" (R. 34.) (Italics supplied.) It is submitted that the above italicized words constitute a conclusion of the court; a conclusion with which we do not agree. It is further submitted that, just as the act was amended to include federal employees, so should it have been to expressly include state employees.

Congressional intent is determined as of the time of enactment and such determination should not be influenced by later developments or the hindsight of tax enforcement officials. If subsequent developments or circumstances make necessary a change in statutory law, such change should be brought about by legislation, not by a change in the interpretation of such law. This is a principal reason for the frequent meetings of Congress.

Such legislative history clearly reveals that when the pertinent sections were enacted, Congress had no thought of including states or officers or employees thereof. In fact, it was not until recent years that incomes of officers and employees of a state were even subjected to the federal income tax. *Helvering* v. *Gerhardt*, 304 U.S. 405, 82 L.ed. 1427 (1937); Section 3401, I.R.C., 1954 (formerly Sec. 1621, I.R.C., 1939, as amended in 1943). It is noted that in Sec. 3401 Congress expressly included "an officer, employee, or elect-

ed official of the United States, a State * * *," relative to those against whom withholding tax applied. It thereby evidenced its belief that federal and state employees, while not exempt, must be specifically included in an internal revenue act.

It is pertinent that the Court of Appeals, in the instant case, in requesting a supplemental brief, asked for "any data reflecting the intent to authorize the filing of liens and levying of distraint upon the accrued income of state employees." The very language of the court's order indicates that it wanted factors positively showing the intent to so authorize such levies. Instead of the positive, a negative approach was employed. Both the court below and the government, while failing to produce any data reflecting such intent, stated in effect that the legislative history does not reveal the existence of any negative intention. It is respectfully submitted that Congress in its original enactments concerning such levies did not include states; that throughout the years it did not change the language of such statutes; and that, in order to show by the legislative history of such statute that an intent to include states existed, factors of a positive nature must be in evidence. It is inadequate to blandly say that Congress must have intended to include states merely because throughout the years no intention to exclude them appears. Sight must not be lost of the fact that neither the state nor an officer or employee thereof was included in the language of the statute.

State Is Not Included In Term "Person," Except in Special Cases

The case at bar is not a proceeding against a taxpayer for the nonpayment of taxes, but rather is a proceeding to impose a penalty against one supposedly in possession of property of the taxpayer, for his failure to remit to the Department of Internal Revenue such property, as demanded by a Notice of Levy served upon him. It should be noted that the Notice of Levy (R. 19) served upon Edgar B. Sims, Auditor of the State of West Virginia, was addressed to the State of West Virginia, as the person holding property, moneys, etc., belonging to the taxpayer. Examining the language of the pertinent sections of the Internal Revenue Code of 1954, a crucial question arises as to whether the State is a "person" in possession of property or rights to property of the taxpayer within the meaning of Section 6332.

The definition of "person" lists what it intends to mean and include. This is evident not only in Section 6332(c) but also in Section 7701 of the Internal Revenue Code, wherein definitions are set out for terms used anywhere throughout Title 26 of the United States Code. It is obvious that the state is not included in either of these definitions. How, then, can a state be a person as contemplated by Section 6332? A state is *sui generis*, which is defined in Black's Law Dictionary, Third Edition, as, "of its own kind or class; i.e., the only *one* of its own kind; peculiar." It is separate and apart from any other entity and requires separate and distinct treatment. Consequently, if legislation intends to affect a state, such intent should be

set out in clear and unambiguous language. Certainly, in common usage, the term "person" does not include the sovereign state.

There are, however, certain exceptions to the foregoing proposition. While a state has sometimes been held to be included within the meaning of "person", an examination of the cases so holding readily reveals the reason therefor and the manner in which they are distinguishable from the case at bar. The respondent herein has argued to the contrary and has cited in support of its position *Georgia* v. *Evans*, 316 U.S. 159, 86 L.ed. 1346 (1942), *United States* v. *Graham*, 96 F. Supp. 318 (D.C. F. D. Cal. 1951), and *Ohio* v. *Helvering*, 292 U.S. 360, 78 L.ed. 1307 (1934).

In *Georgia* v. *Evans*, *supra*, the state was included within the meaning of "person". This, however, was an action brought under the Sherman Anti-trust Law, wherein the state as a person sought treble damages for a wrong committed in the purchase of asphalt. The court said that to hold otherwise would deny the state all means of redress when mulcted by a violator of the Sherman Law. Therein the court said that the word "person" does not necessarily include a state. This was stated in the following language:

> "Whether the word 'person' or 'corporation' includes a state or the United States depends upon the legislative environment."

In *United States* v. *Graham*, *supra*, it was held that a state was a "person" within the meaning of Section 3678(b) of the Internal Revenue Code of 1939 (now section 7403(b) of I.R.C. 1954). This section reads as follows:

> "All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court."

This section is concerned with the parties in a proceeding to enforce a lien on property. That Congress did not mean to exclude the state from those who could be made a party to such proceeding is consonant with reason and the object there sought to be achieved—the adjudication of the rights of all claimants. But a decision that the state may be brought in as a party along with other claimants in a suit to enforce a lien against property does not establish that there was a congressional intent to include the state within the meaning of the term "person" wherever said term may appear in the Internal Revenue Code. As stated by the court in *Georgia* v. *Evans, supra,* the legislative environment must be examined.

In *Ohio* v. *Helvering, supra,* the state was held to be a "person" under a federal statute which imposed a tax upon "every person who sells * * * distilled spirits." Here the State of Ohio was engaged in the sale of alcoholic beverages through its stores, and was held to be conducting a nongovernmental proprietary function, thereby causing it to be embraced within the meaning of the word "person" as used in the statute. The court said:

> "* * * that the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a 'person' * * *."

This case does not contend that the word "person" always includes a state, but says that whether it does

or not depends upon the connection in which the word is found.

The respondent cites these cases for the proposition that the word "person", when used in the Internal Revenue Code, includes the state. As pointed out above, this is true only in certain cases. In *McBride* v. *Board of Commissioners*, 44 F 17 (1890), and *United States* v. *Cooper Corporation*, 312 U.S. 600, 85 L.ed. 1071 (1941), the courts held that such term did not include the state. It is not contended that the two latter cases preclude a state from ever being considered a person, but it is asserted that the legislative environment of the statute and the circumstances under which the term "person" is used must be considered to properly determine such question. We are herein concerned not with a suit to enforce a lien against property, but rather with a proceeding to impose a personal penalty upon a public officer for an alleged violation. It is pertinent that a governmental rather than a proprietary function of the state is involved.

Penal Statute Should be Strictly Construed

Section 6332 of the Internal Revenue Code of 1954, under the provisions of which judgment was entered against this petitioner, is a penal statute and as such should be strictly construed. That it is penal in nature is clearly indicated by the language used in the title of subsection (b), "Penalty for violation." Ordinarily the word "penal" connotes a penalty imposed for a criminal offense whereby a person may be deprived of his liberty. This is extended, however, to apply to an act which imposes a penalty or creates a forfeiture as a punishment for the transgression of its provisions.

50 Am. Jur. 35, Statutes. The latter may be civil in nature and is illustrative of the penalty imposed upon this petitioner.

Penal statutes, as a rule, are not to be extended by construction, but must be limited to cases clearly within the language used. *United States* v. *Chemical Foundation*, 272 U.S. 1, 71 L.ed. 131 (1926). While this case differs from the instant case factually, it holds that a penal statute is not to be extended to cases not clearly within its terms or to those exceptional to its spirit and purpose. In the case at bar, the penalty provided is to be imposed upon any person in possession of property of the taxpayer who refuses to surrender it in accordance with the levy. This petitioner is not such person, and to hold that he is constitutes a deviation from the strict construction rule applicable to penal statutes.

The rule of strict construction applies not only to penal statutes generally, but applies also to tax statutes which are penal in nature. *Rodenbough* v. *United States* (C.C.A. 3rd), 25 F. 2d 13 (1928); Sutherland, Statutory Construction, 3rd Ed., Vol. 3, Sec. 5603. Here the petitioner has been subjected to a penal tax statute and, under the well-established law, is entitled to consideration in accordance with the foregoing strict construction rule. This is particularly so where a penal tax statute is involved and such an interpretation would result in a construction in favor of the government and against the individual. See *Gould* v. *Gould*, 245 U.S. 151, 62 L.ed. 211 (1917); *United States* v. *Merriam*, 263 U.S. 179, 68 L.ed. 240 (1923); and *Elliott* v. *East Penn. R.R. Co.*, 99 U.S. 573, 25 L.ed. 292 (1879).

It is recognized by the petitioner that the above strict construction rule must be reasonably applied and should not be used to defeat the obvious purpose of the act. Congress has enumerated those who are to be affected by the provisions of Sections 6331 and 6332 of the Internal Revenue Code of 1954. It has listed officers and employees of the federal government and District of Columbia; it has listed persons; and, within the latter, it has listed officers or employees of a corporation, member or employee of a partnership, an individual, trust, estate, association or company (Sec. 7701 I.R.C., 1954). Neither state nor officer or employee thereof is listed or mentioned anywhere in Sections 6331 or 6332. Under the universally accepted legal maxim, "expressio unius est exclusio alterius," officers or employees of a state, having been excluded from a covered list, should not be brought within the statute by construction or interpretation.

The court below has held that by the definition of the word "person" Section 6332 permits an action against an individual "in his own person and estate" who has held property subject to levy in a purely representative capacity. It then erroneously quoted from Section 6332(c) by saying it includes a person who as "officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation." (R. 36.) As actually defined in Section 6332(c), the term "person" includes "an officer or employee *of a corporation* or a member or employee *of a partnership*, who as *such* officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation." (Italics supplied.)

It is submitted that the manner in which Section 6332(c) was quoted by said court places quite a different meaning on the word "person" than is actually stated and intended. In the first place, this petitiioner is an officer of a state, not an officer of a corporation. Secondly, this petitioner did not hold property of the taxpayer subject to levy. Section 6332, being penal in nature, should be strictly construed so as to afford to the word "person" the meaning actually stated therein. This the court below did not do.

II

The Provisions of Sections 6331 and 6332 of the Internal Revenue Code of 1954 do Not Authorize the Direction of the Levy Provided Therein Against this Petitioner.

In the case at bar we are concerned only with the personal liability of the petitioner. The judgment of the Federal District Court, affirmed by the Court of Appeals, imposes a penalty in the nature of a fine, pursuant to the provisions of Section 6332(b) of the Internal Revenue Code of 1954. The pertinent portion of that section reads as follows:

> "Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the secretary or his delegate, shall be liable in his own person and estate to the United States * * *."

It is noted therein that the liability falls upon any person who fails or refuses to surrender, as required by subsection (a), any property or rights to property subject to levy. It therefore becomes necessary to

examine said subsection (a), the pertinent part of which is quoted as follows:

> "Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the secretary or his delegate, surrender such property or rights (or discharge such obligation) to the secretary * * *."

An examination of the above-quoted sections shows conclusively that the penalty provided in 6332(b) is predicated upon the requirements set out in Section 6332(a). The last quoted section uses the words "any person," it being contended by the government that those words necessarily include this petitioner. However, the words "any person" are qualified and limited to only those persons in possession of (or obligated with respect to) property or rights to property subject to levy. The attention of the Court is respectfully directed to the notice of levy involved in this case (R. 19). It is noted that such levy is directed to the State of West Virginia, as the person holding property, moneys, etc., belonging to the taxpayer. If the state is a person within the meaning of the statute, and we do not believe that it is, then the state would be subject to the penalty referred to herein. Certainly this petitioner, an individual, is not a person in possession of or obligated with respect to property or rights to property of the taxpayer. He cannot be included in the requirement set out in Section 6332(a) and cannot, therefore, be subject to the penalty provided in Section 6332(b). Edgar B. Sims as an individual was not and could not be in possession of or obligated with respect to the wages of the taxpayers involved herein. As an individual, he had no more possession of or con-

trol over the wages of the taxpayers employed by the State than any other individual private citizen of the State.

The respondent has argued and the Court of Appeals has stated, in relation to this case, that the state auditor is the officer obligated with respect to the salaries of state employees and that employees entitled to payment for their services may enforce their rights by mandamus against him. In support thereof the court below has cited *State* v. *Sims*, 55 S.E. 2d 505, 133 W. Va. 239 (1949); *State* v. *Sims*, 68 S.E. 2d 489, 136 W. Va. 789 (1952); and *State* v. *Sims*, 82 S.E. 2d 321, 140 W. Va. 64 (1954). An examination of these cases shows in each and every instance that the mandamus proceeding was instituted against Edgar B. Sims, Auditor of the State, to require him to honor a requisition to expend State moneys. In the instances where the writ was awarded, the judgment was against the Auditor of the State and not against Mr. Sims in his individual capacity. We know of no case wherein a writ was awarded against Mr. Sims in an individual capacity or wherein he became personally liable. Likewise, in the instant case, if liability exists, it must be against the auditor, not against this petitioner, as an individual.

In summary of this point, it is respectfully submitted that this petitioner, Edgar B. Sims, individually, did not have possession of or control over any moneys due the taxpayers employed by the State; that the said notice of levy was addressed and directed to the State of West Virginia, as the person in possession thereof; and that no authority exists in the statutes involved which would permit the direction of such levy against this petitioner.

Chapter 12, Article 3, Section 13a of The West Virginia Code (Michie, Sec. 1031(1)) Was Not Intended To Authorize The Withholding of Funds For The Satisfaction Of The Instant Levy.

The respondent has contended that the above West Virginia statute specifically authorizes the state auditor to honor the levy served in this case. The Court of Appeals has joined in this view (R. 36). It is respectfully urged that an examination of the above statute, hereinafter referred to as Section 1031(1), fails to support such contention. The pertinent language thereof reads as follows:

> *"Deductions by State Auditor from Salaries of State Officials and Employees to Pay Taxes and Purchase United States Government Bonds.* —The auditor of the State of West Virginia is authorized to deduct and withhold sums from the salaries or other compensation of state officials and employees, to purchase United States government bonds and other United States government obligations, or to pay taxes as may be required by an act or acts of the congress of the United States of America."

It is noted that the title to Section 1031(1) relates to deductions from wages and salaries of state officers and employees for two purposes, namely, (1) to pay taxes and (2) to purchase United States government bonds. The West Virginia Constitution (Article VI, Section 30) provides that an act shall embrace only that object expressed in its title. That object is the authorization to deduct only for the purposes expressed. It is necessary to consider the language of

the statute and the legislative environment in which it was enacted.

Sections 1031(1) was enacted in 1943, at a time when all efforts were directed to the war effort. Many measures were enacted, both by Congress and by state legislatures, for the purpose of enhancing the economy of the government. It was in this environment that the West Virginia Legislature adopted Section 1031(1).

One of the main purposes, as indicated by its title, was to readily enable state officers and employees to purchase government bonds. The other purpose was to permit deductions from wages for the payment of income taxes directly to the Government. These are commonly referred to as withholding taxes and relate only to taxes on income earned in state employment. This was a reflection of the action taken by Congress only shortly before. The West Virginia Legislature thereby, as indicated by the title and by the language used in the body of the act, expressed its desire to cooperate with the federal government. Such cooperation was, however, intended only in the fields covered by the statute. Expressly, the state desired to enhance the sale of government bonds among state employees, and, further, to provide a method whereby such employees may pay taxes on their incomes as they were earned. Neither the language nor the spirit of the statute intended to permit deductions from wages for any and all purposes. It was not thereby intended to permit deductions for the collection of delinquent taxes or for any purpose other than those expressly stated in the act. It is earnestly urged that the West Vir-

ginia Legislature of 1943 did not intended to include the instant levy when it enacted this section authorizing the auditor to deduct sums from the salaries and wages of officers and employees of the state.

III

A Public Officer is Not Personally Liable for the Consequences of an Act Performed Within the Scope of his Official Authority and in the Line of his Official Duty.

In this proceeding the primary consideration is the personal liability which has been imposed upon this petitioner under the provisions of Section 6332 of the Internal Revenue Code of 1954. The complaint was based upon the refusal of the petitioner to honor the levy referred to herein. As heretofore stated, such levy was addressed to the State of West Virginia and was served upon petitioner, Edgar B. Sims, Auditor. It was not served upon him as an individual. Likewise, when he refused to comply with the demand therein, he was not acting in his individual capacity, but as an officer of the state.

The widely accepted and general rule is that a public officer, whether judicial, quasi-judicial, or executive, is not personally liable for the consequences of an act performed within the scope of his official authority and in the line of his official duty. 43 Am. Jur. 85, Public Officers, Sec. 273; 67 C.J.S. 417, Officers, Sec. 125; *Moore Ice Cream Company v. Rose*, 289 U.S. 373, 77 L.ed. 1265 (1932). This was a case where the defendant, a collector of internal revenue, was under

an imperative duty, but it nonetheless exemplifies the freedom of a public officer from personal liability. He is equally protected from personal liability if he adopts a mistaken construction of an act of Congress or a state statute. 43 Am. Jur. 86, Public Officers, Sec. 274. This was cogently stated in *Cooper v. O'Connor*, 99 F. 2d 135 (1938), wherein the court said:

> "* * * if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and application of the law. * * *"

Applying the language used by the court in the above-quoted case, it is earnestly urged that this petitioner should not be held personally liable for an act committed by him in his official capacity as auditor of the state. When the notices of levy were served upon the auditor, he entertained in his own mind an honest doubt as to the validity thereof in relation to the disbursement of state moneys. As a result of such doubt, he consulted the office of the attorney general, whereupon he was advised that such sections of the Internal Revenue Code did not apply to the state. Subsequently, the auditor refused to honor such levy. In so doing, he was not acting outside the scope of his authority. Furthermore, in a case such as this, there can be no question of malice or corruption.

There is a line of authority, according to *Cooper v. O'Connor, supra*, which holds that a public officer

wrongfully performing a ministerial duty may be personally liable for the consequences of his act. It is submitted, however, that in the instant case, the petitioner was required by law to exercise discretion. Under the provisions of Chapter 12, Article 3, Section 1, of the West Virginia Code, the auditor is required to exercise discretion in the disbursement of state funds. It was so held in *Robinson v. LaFollette*, 46 W. Va. 565, 33 S.E. 288 (1899); *Standard Oil Co. v. Fox*, 6 F. Supp. 494 (1934); and *State v. Sims*, 127 W. Va. 786, 34 S.E. 2d 585 (1945).

As evidence of the requirement to exercise discrecretion, the pertinent language of Chapter 12, Article 3, Section 1, of the West Virginia Code is quoted as follows:

> "Every person claiming to receive money from the treasury of the State shall apply to the auditor for a warrant for same. The auditor shall thereupon examine the claim, and the vouchers, certificates and evidence, if any, offered in support thereof, *and for so much thereof as he shall find to be justly due* from the State, *if payment thereof be authorized by law*, and if there be an appropriation not exhausted or expired out of which it is properly payable, he shall issue his warrant on the treasurer, specifying to whom and on what account the money mentioned therein is to be paid, and to what appropriation the same is to be charged. * * *" (Italics supplied).

It is noted that such statute specifically requires the auditor to determine the amount justly due from the state and if payment thereof is authorized by law. He is thereby under a duty to consider the legality of the

expenditure of any state moneys. For example, if a requisition is presented to the auditor which he believes to be an improper expenditure, he may refuse to issue his warrant. In such event, mandamus is available as a remedy to attempt to require him to issue the warrant. If the writ is awarded, then he issues the warrant and the state moneys are accordingly disbursed. In no case, though, has the auditor been required to personally pay such moneys. This course affords protection to the people by protecting their officers against vindictive and retaliatory damage suits, and thereby insures their fearless and effective administration of law. *Cooper v. O'Connor, supra.*

In the instant case the auditor, in the performance of his official duty, exercised the discretion as required by statute, and in so doing concluded that state moneys should not be disbursed in accordance with this respondent's demand. If the petitioner is to be personally accountable for acts performed in his official capacity and within the scope of his official authority, is there not a danger that he, or any public officer so situated, would be reluctant to exercise discretion as required of him by law? Would not the public then lose the protection of law as provided in West Virginia Code 12-3-1?

The court below, while agreeing with the legal proposition forwarded by *Cooper* v. *O'Connor, supra,* has held that such rule of law can be changed by an act of Congress. With this we have no quarrel. However, in all equity and justice, it is submitted that if such change is effected, the result of which would be to impose personal liability where it did not theretofore exist, such amendment should be enacted in clear and

unmistakable terms. It should not be effected by interpretation.

This review concerns only the personal liability of Edgar B. Sims. It is respectfully urged that when the act or omission complained of was committed, the petitioner was not only acting within the scope of his official authority, but he was exercising discretion as required of him by law. Under these circumstances, even if, as auditor, this petitioner was mistaken as to the law, he should not be held personally liable therefor.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

26 U.S.C. 6321; Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. 6331. Levy and distraint

(a) Authority of Secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or re-

fusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures.—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

26 U.S.C. 6332. Surrender of property subject to levy

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for violation.—Any person who fails or refuses to surrender as required by

subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

26 U.S.C. 7403. Action to enforce lien or to subject property to payment of tax

(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) Parties.—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree. — The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

(d) Receivership.—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

West Virginia Code, Chapter 12, Article 3, Section 13a:

Deductions by State Auditor from Salaries of State Officials and Employees to Pay Taxes and Purchase United States Government Bonds— The auditor of the State of West Virginia is authorized to deduct and withhold sums from the salaries or other compensation of state officials and employees, to purchase United States government bonds and other United States government obligations, or to pay taxes as may be required by an act or acts of the congress of the United States of America.

The auditor of the State of West Virginia shall, upon the written request or order of any state official or employee, deduct and withhold

sums from the salaries or compensation of state officials and employees to make voluntary purchases of United States government bonds or other United States government obligations for such officials or employees.

The auditor shall keep an account of the accumulated deductions of each state official and employee and shall issue receipts to state officials and employees for all sums deducted and withheld as herein provided. The sums, when deducted, shall be transferred by the auditor to a special fund in the state treasury, and, as soon as reasonably convenient, transmitted to the treasurer of the State of West Virginia, as an issuing agent of federal securities, or such other official or agent of the United States government designated by the secretary of the treasury of the United States of America, from time to time.

Should any official or employee leave the employ of the State at a time when there is not sufficient accumulation of deductions from his salary or compensation to purchase a United States government bond then the auditor shall either purchase United States government savings stamps in the amount of the accumulation or refund to the official or employee the accumulation as an erroneous payment into the special fund herein created.

The auditor shall be responsible for the delivery of United States government bonds or obligations purchased with the deductions from the salaries or compensation of state officials and employees only when the United States government bonds or obligations are presented to him by the official or agent of the United States government for delivery to the state officials or employees.

To promote efficiency and economy in making such deductions as provided herein, the auditor is authorized to promulgate rules and regulations and to designate the time for the presentment of the pay roll requsitions for state officials and employees and requisitions for other claims against the State: Provided, that all officials and employees shall be paid at least once every thirty-one days. All officials and employees of the State shall comply with the rules and regulations promulgated by the auditor under this section.